Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1506.

ROBERT W. MACE,
PETITIONER,

v.

BYRON J. MATTHEWS,
MAYOR OF THE CITY OF NEWBURYPORT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Reply Brief of Petitioner in Response to Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Reply Brief of Petitioner in Response to Brief of Respondent in Opposition to Petition for Writ of Certiorari.

1. In reply to the respondent's brief in opposition to the petition for a writ of certiorari, the petitioner respectfully calls to the attention of the Court the following points in rebuttal to the factual assertions of the respondent:

(a) Contrary to the assertion of the respondent at p. 2, second paragraph, of his opposition brief, to the effect that "all the appointing authority must find is that the conduct or ca-

pacity of the probationary employee, or the character or quality of his work, is not satisfactory . . .", the requirement of G.L. c. 31, § 20D, continues on to mandate that the appointing authority must give to such probationary employee "a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate." (See also Pet. App. 33a.)

(b) At the same page of respondent's brief, last paragraph thereon, there appears the first of numerous recitations within the opposition brief that go outside the scope of the record before this Court and assert evidentiary matters never heard by any court of the Commonwealth of Massachusetts.

(c) The opposition brief, at p. 4, second full paragraph, seems to mischaracterize the petitioner's grievance so as to suggest that he is claiming that he was defamed or stigmatized by a public official. The fact is that the petitioner alleges that a public official, the appointing authority, dismissed the petitioner from his public employment for reasons stated in detail that in fact were founded on false evidence given by perjurious witnesses, not by the public official. Accordingly, the petitioner does not have, never has had, and never has asserted that he had an action for defamation against the appointing authority. Instead, the petitioner availed himself of G.L. c. 231A, § 1, the Declaratory Judgment statute, the appropriate remedy for a probationary employee to seek judicial review of the circumstances of his dismissal from the civil service. (Pet. 4, 18; Pet. App. 42a.)

(d) The opposition brief, p. 5, second paragraph, again raises evidentiary allegations that never were before the Massachusetts courts and are not within the record before this Court.

(e) At p. 7 of his brief the respondent asserts that "There is no civil service regulation which 'forecloses' petitioner from

seeking employment in other cities and towns. Nor is petitioner foreclosed from seeking police work in cities and towns where civil service regulations are not in force." Again, these factual assertions relate to properly pleaded allegations made by the petitioner in the courts below that presumptively he could have proved, had summary judgment not been granted on grounds quite irrelevant to the substance of his grievance.

The petitioner is prepared to prove that he is too old to take another civil service examination to seek police employment under the Massachusetts civil service system. Trial and, it is hoped, reinstatement are his only remedies. Furthermore, he is prepared to prove that his dismissal by the respondent created a presumption against the civil service requirement of an affirmative showing of good character that in fact is required within the Commonwealth of Massachusetts even by those cities and towns that do not follow the optional civil service regulations. The respondent by letter of March 15, 1978, cited to the Massachusetts Civil Service Commission the charges that he sustained against the petitioner and gave them to the Civil Service Commission as reasons for the petitioner's dismissal from police employment. (See Ex. A, attached.)

(f) The opposition brief, at p. 8, first paragraph, commences yet another evidentiary recitation wholly outside the scope of the record. That paragraph begins with the following sentence: "The tapes disclose that it was agreed by the attorneys representing petitioner, petitioner's accuser, and the respondent, that each officer's case would be heard individually." In the courts below, this case was disposed of on summary judgment by way of an affidavit asserting only that the petitioner was within his probationary period when he was discharged from his employment; that is, the Massachusetts courts never heard the tapes, nor any other evidence.

The danger of consideration by this Honorable Court of these factual assertions is brilliantly illuminated by the third

paragraph on p. 8, referring to witnesses who were, respectively, a physician and a nurse. In fact, these witnesses testified to the accuser's drunkenness and belligerence; they also testified to the physical injuries sustained by the petitioner and alleged to have been inflicted upon him by one of the individuals whom he alleged in his complaint to have given some of the perjured testimony that became the detailed reasons stated by the appointing authority as the basis for the petitioner's dismissal.

This factual rebuttal could continue for several more paragraphs, as does the respondent's improper insertion of largely erroneous factual allegations not within the record. However, suffice it to say that the proceeding at which the perjured testimony was offered in part commenced before the petitioner even arrived at the hearing. The accuser's wife had testified in his support, also perjuriously, and then left the hearing room, passing the petitioner as he sought to enter the respondent's office, where the hearing had already begun. The lady later recanted her testimony as false and coerced by her husband, the accuser, and the petitioner is prepared to prove that recantation at trial by means of objective witnesses. More importantly, the accuser himself later recanted his own perjuries, thus vitiating the detailed reasons for the petitioner's dismissal from employment by the respondent. The petitioner properly pleaded these allegations. He should have an opportunity to prove them.

2. In reply to the points of law within the respondent's opposition brief, the petitioner submits the following assertions in rebuttal.

(a) The respondent relies upon *Codd* v. *Velger*, 429 U.S. 624 (1977). That decision holds, at p. 628, that "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required." In the within case, a non-

mandatory hearing was held before the employer had adopted and disseminated to this petitioner false reasons based upon perjury as the foundation for the termination of his employment. Note also that the petitioner in *Codd* v. *Velger* was proceeding under 42 U.S.C. § 1983, as well as the Due Process Clause of the Fourteenth Amendment, for the alleged deprivation of a civil right. *Id.* at 627.

The petitioner asserts that *Codd* v. *Velger* stands for the proposition that this Court has held that, since an untenured police officer was found by the District Court to have no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failure to rehire him presents no federal constitutional question. *Id.* at 628. Once again, the respondent dances around the fundamental question that underlies this case and fails to confront it. It is: Where the state statute mandates that a dismissal of a probationary employee must be based on detailed reasons, is it within the permissible constitutional reach of the employer to base his reasons upon perjury and false evidence?

(b) The respondent also relies on *Mazaleski* v. *Treusdell*, 562 F. 2d 701 (D.C. Cir. 1977). At p. 714 of that decision, the court, in ruling in the employee's favor and reversing the summary judgment by the District Court, noted that ". . . [t]he disclosure of these reasons might well interfere with his opportunities for subsequent employment . . .."

(c) Contrary to the respondent's assertion that *Paul* v. *Davis*, 424 U.S. 693 (1976), stands for the proposition that any harm to a reputation interest, even where inflicted by a state official, does not result in the deprivation of liberty or property interests, does not invoke the Due Process Clause procedural protections, and that the appropriate remedy is a common law claim for defamation under state law, *Paul* holds that "reputation alone, apart from some more tangible interests, *such as employment*, does not implicate any 'liberty' or 'property' in-

terests sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. Citing *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972), the Court went on to hold that, to establish a claim under § 1983 and the Fourteenth Amendment, more must be involved than simply defamation by a state official. *Id.* at 710.

(d) The respondent asserts that *Scott* v. *Manager, State Airport, Hanscom Field*, 336 Mass. 372 (1957), holds that reasons for a termination notice of dismissal must be taken as final on the facts. A later Massachusetts case, *Canney* v. *Municipal Court of the City of Boston*, 368 Mass. 648, 654 (1975), cited by the petitioner in his petition at p. 18, holds that direct judicial review of dismissal is available nonetheless under the Massachusetts Declaratory Judgments Act, G.L. c. 231A, § 1.

(e) Similarly, the rule in *Vigoda* v. *Barton*, 338 Mass. 302 (1959), also cited by the respondent, does not foreclose judicial review under the rule announced 16 years later in *Canney*. Note that the statute relied upon by the respondent in discharging the petitioner does not say that the appointing authority only must find, as respondent alleges, that the conduct or capacity of the probationary employee or the character or quality of his work is not satisfactory. The statute goes on to require that, in addition, the appointing authority must give the employee a statement of detailed reasons for such a finding. The petitioner contends that those detailed reasons may not be based upon false or perjurious evidence, and that he is entitled to judicial review of those properly pleaded allegations. The fact relied upon for summary judgment by the trial court, that the petitioner was within his probationary employment term at the time of his dismissal, is wholly irrelevant to such considerations.

Respectfully submitted,

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Exhibit A.

Office of the Mayor
CITY HALL
CITY OF NEWBURYPORT
MASSACHUSETTS
01950

RICHARD E. SULLIVAN
Mayor

TELEPHONE 465-8122

March 15, 1978

Commonwealth of Massachusetts
Division of Personnel Administration
1 Ashburton Place
Boston, Mass. 02108

Attn: Mrs. Barbara E. Jarvis, Director, Bureau of Examinations

Dear Mrs. Jarvis:

I am enclosing the certification list and the report supplement showing those willing to accept the appointment to the above captioned position. I have also listed my choices of whom I would like to appoint.

Your attention is called to the fact that the top name on the list has been eliminated based on a conversation between City Solicitor Richard Jones and your legal counsel, Mr. John Burrill which I now explain, and for which supporting material is also enclosed:

The name of Robert W. Mace was deleted because he was previously discharged from the Police Department during his probationary period. He appealed his discharge to the Civil Service Commission which refused to hear the appeal because of his probationary status.

Mace subsequently brought an appeal in Essex County Superior Court as Civil Case #6899 entitled Mace v. Byron J. Matthews (the then Mayor of Newburyport). The discharge was upheld by Superior Court Judge Banks on February 13, 1978. A copy of the allowed motion is attached hereto.

I therefore request that you allow me to remove Mace's name from the list as noted on form 16, part II, so we may proceed to appoint the other worthy candidates. Thank you for your assistance.

Cordially yours,

Richard E. Sullivan, Mayor